The Supranational Rule of Law: Taking Stock

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Selon l'article 164, le droit ecrit du traité a au dessus de lui le Droit avec un D majuscule, le Droit non ecrit, l'Idée du droit. Et la Cour doit assurer le respect de ce Droit

C. Kakouris, *La Cour de justice des Communautés européennes comme Cour Constitutionnelle: Trois Observations*

While a transnational conception of the rule of law requires the engagement of and commitment to the EU project from all actors involved, this begs the question as to what happens when the assumptions underlying art. 2 TEU are no longer applicable? For the rule of law, 2019 has been of fundamental importance because we have been taught important constitutional lessons and started getting answers to some of the most crucial constitutional questions. While much still remains shrouded in mystery and question marks are aplenty, at least the judicial trajectory for the rule of law in 2020 has been set in 2019.

Know Your Enemy: The Rule of Law Crisis

For starters, one must be very clear that not everything should be grouped under the high-handed tag of "the rule of law crisis". When properly defined, it is not about well-intentioned disagreements among reasonable democrats on how best to implement a technical piece of EU law. There is a categorical difference between a lack of implementation of EU law and/or interference with citizens' EU rights and the blatant rejection of the Court of Justice's ("the Court") authority, targeting national judges for sending preliminary rulings to the Court or masterminding a hate campaign against the judges that dare to say "no" to such practices of intimidation and fear-mongering and now stripping the European mandate of national judges of any practical significance. It is exactly these extreme examples of rule of law breaches that demand and will continue to demand in 2020 and beyond (see my forthcoming analysis) the explicit spelling out of the core of the EU rule of law read in the light of the rule of law's objective. Excluding arbitrariness as a widely agreed-upon rationale for the rule of law must translate into constructing the core of the rule of law principles that are shared by all as part of once implicit and non-negotiable elements of the original consensus that brought all its parties together. If such a core cannot be agreed upon and enforced in times of crisis, then, the integration project itself is being undermined and loses its ethos. While commitment to the EU project by all actors involved is absolutely crucial, one of the tenets of the rule of law crisis is that today such an assumption is no longer valid, but rather a counterfactual as not all member states are ready to acknowledge that the values are indeed shared. Quite to the contrary, they question the common understanding of some

basic ideas, chief among them, the rule of law. The rule of law crisis makes clear that there must be no free riding and that there must be EU content of the rule of law and standards binding on all. The rule of law, while clearly anchored in the domestic legal systems and traditions, must take on its own meaning if it is indeed to serve as a behavioral yardstick. If there is one indisputable lesson from the rule of law crisis this is exactly it. One should be clear and precise about the language, though. Agreeing on the core is never about imposing uniformity but rather about enforcing these basic features of the legal order that are essential to its functioning, and more broadly, survival. This is not "imposed uniformity" but acceptance of being bound by the essential principles that make up the EU. The EU will lose its ethical face exactly when it fails to enforce these agreed-upon constitutional essentials. This would only acknowledge the oft quoted and driven by the hopeless *status quo* saying that the EU has a *body* but not a *soul.* After all, if we cannot find the core of our commitments, then the whole political community that the EU undoubtedly is, loses much of credence and credibility. The choice of words (enforcing credible commitments, not imposing uniform standards) is particularly important as it frames and orders our discourse about the rule of law as we struggle to move along. All too often too much is read into the differences, instead of focusing on, and locating, the commonalities that are shared.

The Existential Jurisprudence

Contrary to fears expressed here and there, art. 2 TEU is not to be enforced against the Member States in the abstract and the Union would not claim an unfettered competence. Granted the rule of law enforcement must involve all the actors and not just the Court, but the EU political institutions have not been ready to defend the rule of law as vigorously as it deserves. All too often political calculations led to embarrassing silence and short-term bargaining. The issue of great practical importance is what happens when the EU institutions fail in their loyalties to the Union legal order and simply look the other way. This is exactly when the Court, and not other institutions, as has often been the case in the past, stands as a last resort in the way of the Union falling apart. Judge T. Koopmans was quite right when he remarked that "*the Court of Justice is aware that lack of judicial interference may very well mean that nothing will happen at all*".

Thanks to the developments in 2019, there are already six constitutional signposts along the rule of law trajectory: *i)* art. 2 TEU is not declaratory but has a substantive dimension; *ii)* the Court has clearly embraced art. 2 TEU as the hard core of the EU law and made it justiciable. *iii)* Art. 2 TEU is not only political, but imposes legal duties which are enforceable by, and before, the Court through art. 19 TEU; *iv)* Art. 19 TEU serves as the jurisdictional trigger irrespective of any linkage to substantive EU law other than art. 2 TEU and the duty to respect the values spelt out therein; *v)* Member States are under a legal duty to have independent courts as a general matter of state organization; *vi)* the general obligation to guarantee judicial independence of national courts is directly grounded in the Treaties (art. 2 TEU as a rationale and art. 19 as a jurisdictional trigger) and thus there is no need (as some still argue…) to extend the jurisdiction of the Court.

Art. 19 TEU: a guiding star

While the concrete manifestations of the rule of law are always subjective and a matter of choice, it is argued that the "traditional" catalogue and recap of the rule of law-inspired general principles has been good for the times where the narrative was driven by "business as usual". Yet, integration A.D. 2019 is anything but. While the projection of the rule of law through an amalgam of principles has been a staple of the field, much more is needed today. The EU needs to break from the *status quo* and build its own rule of law discourse. The rule of law must be seen as a meta principle that settles the most fundamental question of belonging and identity of meta politics. Instead we get a fairly conventional and uncontroversial recap of the state of art, while the times of the rule of law crisis invite academia to move beyond such traditional incantations. Today the role of the rule of law must go beyond mere instrumentalization. It defines and determines the legal standards that are then implemented through principles. The rule of law dictates commands and has a life if its own, rather than being simply expressed through principles.

Often-heard criticism is that the rule of law is always tailored to the objectives of the legal order and the continuation of the EU project, rather than the objectives of the Treaties being interpreted with the rule of law as a stand-alone and overarching meta principle. The challenge thus is flipping this dominant discourse, and moving beyond the usual talk and analysis focused merely on the rule of law as seen through the operation of principles. The rule of law as a meta principle dictates certain principles rather than being simply channeled and expressed through them. In 2019, the EU needs rule of law manifestations that would have teeth and bite the dark forces behind the rule of law crisis. This is exactly where art. 19 TEU offers a rescue path. It is clear that art. 19 TEU plays a special role and build around the effective judicial protection by independent courts as the undisputable core of the European rule of law. As the opening quotation by C. Kakouris emphasizes the untapped remedial potential of art. 19 TEU ("*The Court shall ensure that in the interpretation and application of the Treaty the law is observed*"), 2019 saw the Court following up on this powerful idea (and a dream) of the "unwritten law" that underpins the special ethos of membership in the "Community based on the rule of law". As interpreted by the Court in the Polish cases, art. 19 TEU emerges as the complete and stand-alone one in that it dictates its own sphere of application and builds the legal discipline to which it subjects the Member States. Often heard arguments that it is impossible to establish a unitary conception of the rule of law at the EU level, should be qualified today by the emerging tendency to spell out exactly this: core constitutional elements that distinguish the EU rule of law. By introducing and then repeating over and over the novel terms "*essence*" and "*essential*", the Court speaks the meta-language of identity and specificity of the EU legal order. Judicial independence as such is not an intrinsic value, rather it is instrumental to ensure the observance of a first-order right that is the right to a fair trial. The very existence of effective judicial review designed to ensure compliance with EU law is *essential* for the rule of law and it is the duty of every Member State to ensure that the courts meet the requirements *essential* to effective judicial protection in accordance with art. 19 TEU. These *dicta* clearly show that the rule of law is no longer simply an objective, value etc. but rather that the right to a fair trial, effective judicial protection and independence of the judiciary are

becoming First Principles of the EU rule of law. They command very concrete duties in the European public space. Art. 19 TEU starts playing two fundamental roles in this process: it provides a normative and axiological anchoring for the rule of law and it serves as the jurisdictional trigger to enforce and protect the values of art. 2 TEU.

In the light of all this how true then the assertion by Judge Koopmans sounds in December 2019 …

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